3. The documents ordered to be produced by AHC by the order of the Harris County, Texas, District Court dated 1987.

Appeal allowed.

Solicitors: *Brymer Marland & Co.; Norton, Rose, Botterel & Roche.*

SINGAPORE REPORTS

BOEY KUN HONG & ORS. v. JOO HEE HOLDINGS PTE. LTD.

[C.A. (Lai Kew Chai, Rajah JJ. & Chan Sek Keong J.C.) March 17, 1987]

[Singapore – Civil Appeal No. 17 of 1986]

Contract – Option – Purchase of entire paid-up shares in company owning 3 parcels of land – Application for redevelopment approved – Alienation of State land – Warranties by appellants – Increase in premium and stamp duty – Whether appellants liable to pay.

Contract – Option – Purchase of shares subject to unqualified warranties – Breach of warranties – Increase in premium – Whether appellants liable to pay.

The appellants were at one time the shareholders of a company called Natwest Development (Pte.) Ltd. ("Natwest") whose only assets were three parcels of land. One of the parcels ("the Yellow Parcel") of approximately 465.4 sq.m. was first purchased at $1,630,000 subject to adjustment after survey and on the terms and conditions of a letter dated October 21, 1980, from the Commissioner of Lands, Singapore. The terms included the payment of stamp fees for the issue of the lease.

Originally, Natwest had obtained "in principle" approval for the erection on the development properties of a 19-storey banking hall with a plot ratio of 5 instead of the expected 10. Because of the low plot ratio, Natwest considered the development not commercially viable. Consequently, Natwest submitted new plans to the competent authority for approval to develop a 20-storey banking hall/offices on the site. "In principle" approval was given for the new proposal.

The respondents were interested in taking over the development from the appellants and so on February 19, 1981, the appellants granted an option ("the Option") to the respondents to purchase the appellants' entire shareholdings in Natwest at the price of $50 million subject to and upon the terms and conditions set for therein. Under Clause 7 of the Option, the appellants warranted to the respondents, *inter alia,* that "All development charges, architect fee, property tax, income tax, and all dues and debts of the Company have been discharged or shall be discharged on completion."

Under Clause 9 it was agreed that "Notwithstanding the completion of the sale and purchase of the said shares this Agreement shall continue to succeed and have effect until all provisions hereof have been fully and effectually performed until full effect is given to each and every provision of this Agreement."

The respondents exercised the Option on March 2, 1981. The purchase was completed on July 29, 1981.

On May 27, 1981, the Commissioner of Lands wrote to the solicitors of Natwest to inform them that the alienation of the Yellow Parcel was approved for the development of a 19-storey bank/hotel building and that since this

project had been abandoned in favour of a 20-storey banking/office building, the earlier terms were no longer applicable. The offered price was thereupon increased to $12,506,000 subject to adjustment after survey and the annual rent was also increased substantially. Natwest accepted the revised terms and conditions of the alienation of State land.

On February 22, 1984 the Commissioner of Lands confirmed that the area of the Yellow Parcel was 485.6m^2, an increase of 20.2m^2 and that the additional sums of $545,200 for premium and $16,364 for stamp duty were payable. On September 4, 1984, Natwest paid the said sums to the Commissioner of Lands in order to obtain title of the Yellow Parcel.

On October 30, 1984, the respondents commenced an action against the appellants. The respondents relied on the warranties given by the appellants under Clause 7 of the Option. Chua J. held that notwithstanding that the completion of the sale of the shares had taken place on or about July 29, 1983, the additional premium was an outstanding liability under Clause 7(h), (j), (k), (p) and (t) of the option and that each of the said warranties was breached as soon as the additional premium became payable. Accordingly he gave judgment in favour of the respondents ([1987] 1 M.L.J. 465). The appellants appealed.

Held, dismissing the appeal: (1) the amount of $12,566,000 was paid as a premium and not for change of use. Even if the revised premium was imposed for a change of use, it would have been in the nature of a development charge for which the appellants were also responsible under Clause 5 of the Option in that, the original project having been abandoned, there was rezoning of the development properties to commercial zone;

(2) whether the claim was based on a breach of warranty or a breach of undertaking, the damages suffered by the respondents was the amount of the additional premium and the stamp duty which Natwest was compelled to pay to the government for the alienation of the Yellow Parcel free from encumbrances. The Court would agree with Chua J. that there was no basis for the appellants to resist the respondents' claim;

(3) the interest payable on the S$545,200 and $16,364 should be varied to 9% per annum from the date of their disbursement up to the date of judgment.

Cases referred to:

(1) *Reardon Smith Line Ltd.* v. *Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 997D.
(2) *Beswick* v. *Beswick* [1968] A.C. 58.
(3) *In re Government Security Fire Insurance, Mudford's Claim* (1880) 14 Ch. D. 634.
(4) *Levison* v. *Farin* [1978] 2 All E.R. 1149.
(5) *Prudential Assurance Co. Ltd.* v. *Newman Industries Ltd. (No. 2)* [1982] 1 All E.R. 354.

COURT OF APPEAL.

Cheong Yuen Hee (*Miss Lauren Ong* with him) for the appellants.

C.S. Wu for the respondents.

Cur. Adv. Vult.

Chan Sek Keong J.C. (delivering the Judgment of the Court): This is an appeal against the judgment of Chua J. who allowed the claim of the respondents/plaintiffs against the appellants/defendants for certain declarations and the recovery of the sums of $545,200 and $16,364 with interest thereon by way of damages for breach of certain warranties.

The appellants were at one time the shareholders of a company called Natwest Development (Pte) Ltd. ("Natwest") whose only assets were three parcels of land ("the development properties") at the junction of Telok Ayer Street and McCallum Street, Singapore.

One of the parcels ("the Yellow Parcel") of approximately 465.4 sq. metres (5009.5 sq. ft.), was first purchased, subject to survey, on a 99-year lease by Natwest from the Government of Singapore at a price (but called "a premium") of $1,630 000 subject to adjustment after survey on the terms and conditions of a letter dated October 21, 1980, from the Commissioner of Lands, Singapore. The terms included the payment of stamp fees for the issue of the lease and other miscellaneous expenses. In conjunction with this purchase, Natwest had also obtained "in principle" approval for the erection on the development properties of a 19-storey banking hall/hotel, with a plot ratio o 5 instead of the expected 10. Because of the low plot ratio, Natwest considered the development not commercially viable and consequently Natwest submitted new plans to the competent authority for approval to develop a 20-storey banking hall/offices building on the site. "In principle" approval for the new proposal was given by the competent authority on November 15, 1980. The respondents were interested in taking over the development from the appellants and so on February 19, 1981, the appellants granted an option ("the Option") to the respondents to purchase the appellants' entire shareholdings in Natwest at the price of $50 million subject to and upon the terms and conditions set for therein.

The relevant terms of the Option are as follows:

(i) Under Clause 5, it was agreed that the development charges levied by the relevant authorities to the commercial zoning and any increase in permitted plot ratio shall be for account of the vendors;

(ii) Under clause 7, the appellants jointly and

severally warranted to the respondents as follows:

"(h) All development charges, architect fee, property tax, income tax, and all dues and debts of the Company have been discharged or shall be discharged on completion.

(i) The Transferors hereby undertake to bear the payment of all property tax levied or to be levied retrospectively on the Project Land by the property tax department for the period ending before the completion of the sale herein.

(j) That the Company is free of all debts and has not entered into any long term or abnormal contract or undertaken any obligations whatsoever except such as are usual and necessary in the ordinary and proper course of its business.

(k) That the balance sheet and profit and loss account of the Company as at the 31st day of December 1980 (hereinafter referred to as "the said date") (a copy of which is attached hereto) gives a true and fair view of the financial position of the Company as at the said date and in particular, save as is stated in the aforesaid mentioned balance sheet, there are no other liabilities of the Company as at the said date.

. . . .

(p) The Transferors shall be responsible and pay all loans, liabilities or moneys owed if any by the Company to various creditors and this sale to the Transferees is free of all loans, liabilities and moneys owed.

. . . .

(t) Up to the date of completion there are none and will be no liabilities contingencies undisclosed or otherwise of the Company other than what have been expressly disclosed in the said date."

(iii) Under clause 9 it was agreed that

"Notwithstanding the completion of the sale and purchase of the said shares this Agreement shall continue to succeed and have effect until all provisions hereof have been fully and effectually performed until full effect is given to each and every provision of this Agreement";

(iv) Under clause 10 it was agreed that

"All warranties and agreements given by the Transferors to the Transferees shall be binding on the Transferors and upon their respective successors in title";

(v) Under clause 11

"The Transferors expressly further covenants with the Transferees to indemnify the Transferees against and save it harmless against any and all claims losses, damages, costs, deficiencies and expenses including reasonable legal fees suffered, incurred or sustained by the Transferees inaccuracies, errors misrepresentations breach of warranty or conditions by the Transferors under the terms of the Agreement."

It can thus be seen that at the time of the Option, the respondents thought they were buying a company which owned the development properties approved for the development thereon of a 20-storey banking hall/offices building, free of all liabilities on completion.

The respondents exercised the Option on March 2, 1981. The purchase was completed on July 29, 1981.

On May 27, 1981, the Commissioner of Lands wrote to the solicitors of Natwest to inform them that the alienation of the Yellow Parcel was approved for the development of a 19-storey bank/hotel building only as proposed by Natwest and that since this project had been abandoned in favour of a 20-storey banking hall/office building, the earlier terms were no longer applicable and would have to be revised to take into account the increased density, as well as the substantial change of use from hotel to office. The offered price was thereupon increased to $12,506,000 subject to adjustment after survey and the annual rent was also increased substantially. Subject to these changes, the original conditions remained applicable. It is clear that the letter from the Commissioner of Lands, although expressed as a proposal to revise the terms and conditions of the alienation was a totally new offer of the same parcel of land on new terms and conditions, on the basis that the original agreement had been, in effect, repudiated by the appellants in abandoning the original development for which the land was agreed to be alienated. The Commissioner of Lands' new offer, if not accepted by Natwest and the appellants, would have had the potential effect of destroying the substratum of the Option and leaving the appellants with a commercially unviable project. It was therefore not surprising that on June 11, 1981, the solicitors of Natwest wrote to the Commissioner of Lands accepting the new offer in the following terms:

"We thank you for your letter dated 27th May 1981, which was received by us on the 4th June 1981.

Our clients accept your revised terms and conditions of the alienation of State Land. Our clients understand that the revised premium is for the 20-storey bank/office building to be constructed on the land and as such, no development and/or rezoning charges would be paid in respect of the land to be alienated to our clients

Yours faithfully,
Sgd."

By accepting the revised terms, Natwest had once again agreed to purchase the Yellow Parcel, subject to survey and pay any additional premium to the revised premium of $12,506,000 as adjusted after survey. This potential liability was well appreciated by the respondents who must have brought this issue up to the appellants as on July 2, 1981, the parties met and agreed, *inter alia*, that the

appellants would "... on completion ... comply fully with all the terms and conditions stated in a letter addressed to you (solicitors for Natwest) by the Commissioner of Lands dated May 27, 1981." This agreement is set out in a letter dated July 3, 1981, from the respondents' solicitors to the appellants' solicitors. The appellants do not, and indeed, cannot dispute this agreement as in paragraph 20 of his affidavit dated August 31, 1985, Wan Pong Poh, the 2nd appellant, deposed that the new terms were accepted after some discussion between the respondents and the appellants and that the appellants also agreed to bear the increased premium.

On October 10, 1983, the Commissioner of Lands informed the new solicitors for Natwest, who were also the solicitors of the respondents (they having taken over the matter after completion of the sale of the shares), that "based on the final surveyed area" the adjusted area of the Yellow Parcel and the adjusted premium were 485.6 sq. metres and $13,111,200 respectively and that the stamp fee payable on issue of the title was $396,968, which after deducting payments already made, left a balance of $545,200 due for premium and $16,364.00 due for stamp duty. On November 3, 1983, the said solicitors wrote to the appellants' solicitors on the Commissioner of Land's letter of October 10, 1983, and received a reply in November 11, 1983, that the appellants were not liable for the additional premium and stamp fee. Natwest's solicitors then wrote to the Commissioner of Lands on November 28, 1983 to request a waiver of the additional premium on the ground that the increased area, with an approved plot ratio of 5, could not be utilised to enhance the value of the building in terms of the built-in area and therefore had no commercial value. The Commissioner of Lands rejected the request on December 8, 1983.

Then, on December 16, 1983, the appellants' solicitors wrote to the respondents' solicitor and said that by virtue of Clause 7(2) of the Option, the development charges of $6,931,176 and the state land premium of $12,566.00 were in fact paid by the appellants from the proceeds of sale of the shares and requested confirmation these sums totalling $19,497,176 had not been included in Natwest's accounts as development expenses. The significance of this letter and of the manner in which these payments were treated in the accounts of Natwest is considered later.

On February 22, 1984, the Commissioner of Lands confirmed that the final survey showed the area of the Yellow Parcel as 485.6 m^2, an increase of 20.2m^2 and that the additional sums of $545,200 for premium and $16,364 for stamp duty were payable. Accordingly, on September 4, 1984, Natwest paid the said sums to the Commissioner of Lands in order to obtain title of the Yellow Parcel from the President of the Republic of Singapore.

On October 30, 1984, the respondents commenced an action against the appellants for the following reliefs:

(1) A declaration that the additional premium and stamp duty amounting to $545,200 and $16,364 respectively claimed by the Commissioner of Lands in his letter to the October 1983 in respect of the alienation of the State Land described in the Commissioner's letter to the defendants' solicitors of August 30, 1980 amounts to a breach by the defendants of the warranties stipulated in Clause 7(h), (j), (k) and (t) of the Option Agreement entered into between the defendants as transferors and the plaintiffs as transferees dated February 19, 1981.

(2) A declaration that the defendants' refusal to pay the said sums of $545,200 and $16,364 on request made by the plaintiffs' then solicitors in their letter of December 20, 1983 amounts to a breach by the defendants of the warranty stipulated in Clause 7(p) of the said Option Agreement.

(3) Recovery of the said sums of $545,200 and $16,364 with interest by way of damages for the defendants' breach of the said warranties.

The action was heard by Chua J. who in a reserved judgment held that notwithstanding that the completion of the sale of the shares had taken place on or about July 29, 1983, the additional premium was an outstanding liability under Clause 7(h), (j), (k), (p) and (t) of the Option, all of which were unqualified, and that each of the said warranties was breached as soon as the additional premium became payable. Accordingly he gave judgment in favour of the respondents in terms of prayers (1), (2) and (3) and interest on (3) at 15½% per annum up to the date of judgment and costs on a solicitor and client basis.

The appellants have relied on 15 grounds in their petition of appeal. The main grounds may be summarised as follows:

(1) the increased premium was a new development charge for the conversion to banking hall/offices and not an increase in premium following survey of the land agreed to be alienated;

(2) the respondents were not entitled to sue as they had not reimbursed Natwest which had paid the additional premium and stamp fee;

(3) the additional premium and stamp fee did not come within any of warranties relied upon by the respondents;

(4) even if the appellants were in breach of any of the said warranties, the respondents have failed to prove that they have suffered any loss as a result of Natwest having to pay the additional premium and stamp fee;

(5) there was no basis for awarding interest at 15½%;

(6) there was no basis for awarding costs to the respondents on a solicitor and client basis.

In our view, the first ground has no substance. The additional premium and stamp duty of $545,200 and $16,364 respectively arose out of the final survey of the Yellow Parcel and was payable by Natwest as the alienee under the terms of the alienation agreement set out in the Commissioner of Lands' letter of May 27, 1983, read with the letter of acceptance from Natwest's solicitors dated June 11, 1983. It is true that the manifold increase in the premium (from $1,630,000 to $12,566,000) was due primarily to the substantial change of part of the use from hotel to office, but in our view, the reason for the increase is irrelevant. The fact is that the amount of $12,566,000 was paid as a premium and not for change of use. In any event, even if the revised premium was imposed for a change of use, it would have been in the nature of a development charge for which the appellants were also responsible under Clause 5 of the Option in that, the original project having been abandoned, there was rezoning of the development properties to commercial zone.

As for the second ground, we do not think that the omission, if any, of the respondents to reimburse Natwest the additional premium and stamp fee is fatal to the respondents' claim in this action. We shall elaborate on this in due course.

As for the third ground, before we consider the meaning and effect of the relevant warranties in Clause 7 of the Option, it is necessary to appreciate what counsel for the appellants has urged us to bear in mind and that is, the factual matrix in this case. It was submitted that the Judge had failed to look at the factual matrix surrounding the whole transaction in order to see what the parties meant to provide for by the various warranties. What this means is that in order to construe the warranties, "... the court ... must place itself in thought in the same factual matrix as that in which the parties were." – see Lord Wilberforce in *Reardon Smith Line Ltd.* v. *Yngvar Hansen-Tangen.*[1] What was the relevant background? The appellants owned all the shares in Natwest which owned the development properties having a total area of approximately 19,990.5 sq.ft. in respect of which approval in principle had been obtained to develop thereon a 20-storey banking hall/office building with a plot ratio of 5. One of the properties, the Yellow Parcel, which had an area of 5009.5 sq. ft., was purchased by Natwest, subject to final survey, from the Government at the premium of $12,566,000 subject to adjustment after survey. The Option was given before the revised terms were offered by the Commissioner of Lands and exercised by the respondents after they were accepted by the appellants. By the agreement of the parties, these terms were incorporated in and substituted for the previous terms applicable to banking hall/hotel development and the respondents exercised the Option on this basis. Any additional premium payable after adjustment was therefore an existing but unliquidated liability of Natwest. The respondents wished to purchase the entire development as approved. They could have done so in one of two ways: (1) to purchase the development properties with the in principle approval, or (2) to purchase all the shares in Natwest. For reasons which were not made known to nor which concerned us, the parties agreed to take the second route to achieve their object. It is apparent to us from the internal evidence of the Option itself that what the respondents bargained for was good title to and unencumbered ownership of the development properties through ownership of Natwest free of all liabilities, known and unknown, accrued during or attributable to the period prior and up to the taking over of Natwest. That this transaction was not an ordinary sale of shares in a company is also confirmed by the appellants' agreement to pay the premium and stamp fee payable on the Yellow Parcel, the development charge on the entire development as well as the architect's fee, property tax, income tax and all debts and dues of Natwest (see Clause 7(h) of the Op-

tion). There was no reason for the appellants to carry what would have been the normal liabilities of Natwest except to place the respondents in a position of having bought the development properties free of all encumbrances. No doubt there were tax considerations involved in the agreement of the appellants to carry all the debts and liabilities of Natwest on completion and in the manner in which the sale transaction was structured but the central idea was that that the respondents or Natwest would not be liable for claims, debts and liabilities, whether known or unknown, contracted during or attributable to the period when the appellants were in control.

With this background, we turn now to the submissions of counsel for the appellants as to the proper construction of the relevant warranties. It was argued that since the sums of $545,200 and $16,364 were paid long after the Yellow Parcel had been alienated, the appellants could not be held to be in breach of Clause 7(b). We do not agree. When the additional premium and stamp fee became payable the Government had not alienated the land but had only agreed to do so. No instrument of title had yet been issued to Natwest at that time. Even if the instrument of title had been issued, we do not think this would have prevented the Commissioner of Lands from collecting the additional premium under the terms of the alienation agreement. On the date of completion of the sale and purchase between the appellants and the respondents, the Yellow Parcel was subject to an encumbrance, the extent of which could not be ascertained until the final survey. Therefore when the final survey showed a larger area than 465.4 sq metres, the additional premium and stamp fee became payable and the encumbrance became precisely measurable in monetary terms.

As regards clause 7(h), we agree with counsel for the appellants that there was no breach of this warranty by the appellants as it applied to the debts of Natwest payable on the date of completion. Likewise, we agree that the warranty in clause 7(k) applied to the overall financial position of Natwest as at December 31, 1980 and that it cannot be said that the financial statements as at such date did not give a true and fair view of the financial position of Natwest.

As regards clause 7(j), it was submitted that the additional premium had not become payable because there was no evidence that the Yellow Parcel had in fact been surveyed. Therefore there was no debt. Furthermore, it was argued that this warranty had no bearing on the issue of additional premium. We do not agree with this submission. Not only had the Commissioner of Lands maintained on October 10, 1983, and February 22, 1984, but the Development and Building Control Division in a letter dated December 11, 1984, had also confirmed to the architects of the development that Land Office had done the final survey. In any case, the appellants' refusal to pay the additional premium was based originally on the around that they were not liable to pay under the terms of the Option and not on the ground that there was no final survey. It is too late for them to raise this point particularly as the respondents had no reason to disbelieve the statements of the competent authorities that a final survey had been done. We agree with Chua J. that this allegation is without foundation. Alternatively, it was submitted that the expression "debts" in Clause 7(j) referred to existing debts *i.e.* debts due and payable on completion. We do not agree. In our view, Clause 7(j) is an unqualified warranty, unlike Clause 7(h) and (k). Having regard to the factual matrix of this transaction, the expression "debts" appearing therein is large enough to include a debt or a liability which was contracted to be paid but whose precise quantum was subject to final determination, in this case, by reference to the area after a final survey.

Counsel for the appellants also argued that the word "owed" in Clause 7(p) meant that the appellants were responsible only for liabilities or money due and payable on the date of completion. We do not agree with this submission for the reasons given in respect of Clause 7(j). In the context of this transaction, the said expression is also large enough to include liabilities which the appellants had contracted to bear but which had not been computed. Money owed in Clause 7(p) includes money contracted to be paid, although the amount to be paid remains subject to final determination. The possibility that upon final survey, there may be no money owing does not detract from such meaning. Although Clause 7(p) is described as a warranty, it has the effect, in law, of an undertaking by the appellants to pay all liabilities or moneys owed by Natwest. It is an undertaking in respect of which the respondents are entitled to specific performance: see *Beswick* v. *Beswick*.[2]

As regards Clause 7(t), we agree with Counsel for the appellants that this warranty applies only to undisclosed liabilities as at the date of completion. The words "or otherwise" have no meaning

in the context of that warranty and certainly cannot mean "disclosed" in such context.

It was, however, submitted by counsel for the appellants that if the appellants had agreed to bear the additional premium resulting from the final survey, there would have been a corresponding liability on the respondents to pay the appellants any reduction or refund in the premium resulting from such survey and that there was no provision in the Option which could be construed as imposing any such liability on the respondents. We are unable to accept this submission for the following reasons: First, the respondents recognised their liability to refund in such circumstances and agreed to do so in their solicitors' letter dated July 22, 1981, to the appellants' solicitors. Secondly, there is no principle of law that the liability of the appellants to pay the additional premium must be matched by a corresponding liability on the respondents to return any refund of premium to the appellants. The question is one of intention. In our view, the respondents were only prepared to pay up to $50,000,000 for the project, free of liabilities, and no more, and the appellants were prepared to take risk (which could not have been an imprudent risk in circumstances where any additional liability was in respect of a change in the area of the Yellow Parcel) on any additional premium that might arise.

Counsel for the appellants also submitted that if the appellants were in breach of warranty, the respondents have not proved that they had suffered any loss and therefore were not entitled to any damages. This argument is based on the premise that value of the respondents' shares in Natwest did not necessarily diminish in value by Natwest having paid the additional premium. It was submitted that (a) the value of the assets of Natwest could have been correspondingly increased by the payment of the additional premium (which reflected an increased value of the Yellow Parcel and, correspondingly, the other two properties as well) and (b) in any case, the respondents have failed to prove any diminution in the value of their shares. Counsel referred to a passage in *McGregor on Damages*, 14th Edition at page 577 for the proposition that the normal measure of damages for breach of warranty in regard to the sale and purchase of shares is the difference between the value as warranted less the value in fact. The reason for this is that "where the shares are in some way not up to the promised standard, this is in the nature of a breach of quality ..." We agree that this principle applies where the consideration paid for shares is based on a promised standard *e.g.* their net asset value, as in *In re Government Security Fire Insurance, Mudford's Claim*[3] where the sellers delivered partly paid instead of fully paid shares, and in *Levison* v. *Farin*,[4] where the purchaser agreed to buy all the shares of a company on the basis of its net asset value and succeeded in claiming damages in the sum of £8,600 when it was found that such value had been reduced by £8,600 by losses which were only ascertained after completion. Although in the present case the parties did not expressly provide in the Option that the consideration of $50,000,000 was based on the net asset value of Natwest at a particular time, it is clear from the terms of the Option that the respondents were bargaining for a company owning all its assets, including the development properties, free of all debts and liabilities as at the date of completion and so that whatever was there on completion free of all debts and liabilities would reflect the asset value of the shares. It is in this general sense that it may be said that the shares in Natwest would be of this standard and that when the additional premium and stamp fee became payable by Natwest, there was in effect a diminution in the value of the shares as agreed upon by the parties to the extent of such additional liability.

Counsel also referred to the decision of the Court of Appeal in *Prudential Assurance Co. Ltd.* v. *Newman Industries Ltd. (No. 2)*[5] to show that shareholders cannot recover for a loss suffered by the company. This decision has no relevance to the present case where the respondents are seeking recovery of damages on the basis of contractual obligations undertaken by the appellants to the respondents.

Counsel for the appellants also submitted that the respondents had not shown that they had reimbursed Natwest the amount paid by Natwest and thus has suffered no loss. We reject this argument. If Natwest had not paid or could not pay the additional premium and stamp fee, the respondents would have had to pay the same if they were to get the shares of the quality promised and if Natwest were to obtain ownership of the land free from encumbrances. There is no reason to believe that if the appellants were to pay the respondents the amount of the judgment the respondents would not pay the same to Natwest to give effect to the intention of the parties, which was that the premium and stamp fee payable for alienation of the Yellow Parcel would not be for the account of or reflected in the accounts of Natwest.

Finally, we would add that the appellants had clearly and unequivocally agreed with the respondents on completion to comply with the terms and conditions of the revised offer. On a common sense construction of this undertaking, this cannot mean that the appellants were released from their undertaking when on completion one of such terms *i.e.* the liability to pay the additional premium, has not crystallised. Nor can it be said that the act of completion is a waiver of such compliance. Therefore, the appellants should not be allowed to resile from their undertaking on the basis of an argument that the respondents have suffered no loss. If necessary, this Court would allow the respondents to amend their pleadings to plead this undertaking on which an order for specific performance could be ordered.

Accordingly, we are of the view that whether the claim is based on a breach of warranty or a breach of undertaking, the damages suffered by the respondents was the amount of the additional premium and the stamp duty which Natwest was compelled to pay to the Government of Singapore for the alienation of the Yellow Parcel free from encumbrances. We agree with the decision of Chua J. that there was no basis for the appellants to resist the respondents' claim.

With regard to the order for payment of interest at 15½% per annum, we agree with counsel for the appellants that Chua J. was wrong in law in applying the rate of interest payable under Clause 7(b) or (c) to this claim. In our view, a rate of 9% p.a. from the date of payment by Natwest up to the date of judgment would be reasonable.

On the question of costs, the appellants have, under Clause 11 of the Option, agreed to indemnify and hold harmless the respondents against all claims and costs sustained by the respondents in consequence of any breach of warranty or condition by the appellants. Counsel for the appellants has submitted that Clause 11 is a normal indemnification clause designed to protect the respondents when they are sued and not when they sue. There is no substance in this submission. As the only warranties in the Option were given by the appellants, Clause 11 will perforce cover a case where the respondents sue the appellants for breach of such warranties.

In the result, this appeal is dismissed with costs to be paid by the appellants on a solicitor and client basis save that interest payable on the $545,200 and $16,364 is varied to 9% per annum from the date of their disbursement up to the date of judgment.

Order accordingly.

Solicitors: *Boey Ng Wan; Donaldson & Burkinshaw.*

TAY BENG CHUAN v. OFFICIAL RECEIVER AND LIQUIDATOR, KIE HOCK SHIPPING (1971) PTE. LTD.

[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Thean JJ.) March 18, 1987]

[Singapore – Civil Appeal No. 57 of 1982]

Company Law – Director's duty – Director tried and convicted for failing to use reasonable diligence in discharge of – Trial by summary procedure – Whether trial judge erred in law – Companies Act (Cap. 185, 1970 Edn.), s. 305(1) (now s. 341(1) of Cap. 50, 1985 Edn.).

Practice and Procedure – Appeal – Circumstances under which appellate court will interfere with finding of lower court.

The respondent was the Official Receiver of Kie Hock Shipping (1971) Pte. Ltd. ("the Company") a private exempt company which was compulsorily wound up on May 27, 1978. The appellant, Tay Beng Chuan, was one of five directors of the Company. Tay Hock Gwan was the Permanent Managing Director.

On September 29, 1981, the appellant was charged and convicted for "failing to recover debts owed to (the Company) by twelve companies incorporated in the Republic of Panama ... which on December 30, 1977 amounted to $10,291,000 and which were allowed to accumulate to $11,551,000 by May 26, 1978 and thereby commit a breach of duty under section 132(1) of the Act to at all times use reasonable diligence in the discharge of the appellant's duty as a director of the Company."

On October 15, 1981, the respondent as liquidator of the Company took out an application by way of a Summons-in-Chambers in the Winding-Up proceedings against Tay Hock Gwan and the appellant pursuant to section 305 of the Companies Act (Cap. 185 1970 Edn.). Tay Hock Gwan did not contest the said application. The appellant opposed the application.

The appellant tendered a written submission before the hearing of the application contending that the summary procedure under section 305 of the Companies Act (Cap. 185, 1970 Edn. now Cap. 50, 1985 Edn.) was "not the proper procedure through which to vindicate such a claim as this." During the hearing, the preliminary question as to the appropriateness of the summary procedure was argued but the learned judge did not, in his written judgment, deal with that question (see [1985] 1 M.L.J. 411).